

June 2004

Update: Domestic Violence Benchbook (3rd ed)

CHAPTER 3

Common “Domestic Violence Crimes”

3.12 Constitutional Questions Under the Criminal Stalking Statutes

A. Double Jeopardy

1. Successive Prosecution

On page 93, immediately before the subsection entitled “**Multiple Punishments**,” insert the following note:

Note: *People v White*, 390 Mich 245 (1973) was overruled by the Michigan Supreme Court in *People v Nutt*, 469 Mich 565, 568 (2004). The Michigan Supreme Court readopted the “same-elements” test to determine whether the prohibition against double jeopardy is violated when multiple charges are brought against a defendant for conduct related to a single criminal transaction. *People v Nutt*, 469 Mich at 568. The “same transaction” test generally prohibited serial prosecutions of a defendant for entirely different crimes arising from a single criminal episode or “transaction.” *Nutt, supra*, 469 Mich at 578. See Section 8.12(C) for further discussion.

CHAPTER 5

Evidence in Criminal Domestic Violence Cases

5.7 “Catch-All” Hearsay Exceptions

Insert the following case summary on page 188 before the summary of *People v Lee*, 243 Mich App 163 (2000):

♦ *People v Geno*, ___ Mich App ___, ___ - ___ (2004):

Defendant was convicted of first-degree criminal sexual conduct for sexually penetrating the defendant’s girlfriend’s two-year-old daughter. During an assessment and interview at a children’s assessment center, the child asked the interviewer to go to the bathroom with her, where the interviewer observed blood in the child’s pull-up. The interviewer asked the child if she “had an owie,” and the child answered, “yes, Dale [defendant] hurts me here” and pointed to her vaginal area. The defendant argued that the child’s statement was improperly admitted under MRE 803(24). The Court of Appeals held that it was not error to admit the child’s statement because the statement was not covered by any other MRE 803 hearsay exception, and the statement met the four requirements outlined in *People v Katt*, 468 Mich 272 (2003).

The defendant also argued that pursuant to *Crawford v Washington*, 541 US ___ (2004), the defendant’s right to confrontation was violated by the admission of the victim’s statements. The Court of Appeals stated:

“We recognize that with respect to ‘testimonial evidence,’ *Crawford* has overruled the holding of *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980), permitting introduction of an unavailable witness’s statement – despite the defendant’s inability to confront the declarant – if the statement bears adequate indicia of reliability, i.e., it falls within a ‘firmly rooted hearsay exception’ or it bears ‘particularized guarantees of trustworthiness.’ *Roberts, supra* at 66. However, we conclude that the child’s statement did not constitute testimonial evidence under *Crawford*, and therefore was not barred by the Confrontation Clause. . . .

Therefore, we conclude, at least with respect to nontestimonial evidence such as the child’s statement in this case, that the reliability factors of *People v Lee*, 243 Mich App 163, 178; 622 NW2d 71 (2000), are an appropriate means of determining admissibility. . . . We therefore conclude that defendant has failed to establish plain, outcome-determinative error with respect to his Confrontation Clause claim.”

CHAPTER 8

Enforcing Personal Protection Orders

8.12 Double Jeopardy and Contempt Proceedings

C. The “Same Offense” — Michigan and Federal Principles

On page 376, delete the second sentence and related citations in the first bulleted item.

1. Michigan’s Protection Against Successive Prosecution

Delete the existing text of this subsection and insert the following text:

People v White, 390 Mich 245 (1973) was overruled by the Michigan Supreme Court in *People v Nutt*, 469 Mich 565, 568 (2004). The Michigan Supreme Court readopted the “same-elements” test to determine whether the prohibition against double jeopardy is violated when multiple charges are brought against a defendant for conduct related to a single criminal transaction. *People v Nutt*, 469 Mich at 568. The “same transaction” test generally prohibited serial prosecutions of a defendant for entirely different crimes arising from a single criminal episode or “transaction.” *Nutt, supra*, 469 Mich at 578. Until the *White* decision in 1973, Michigan courts had interpreted the prohibition against double jeopardy as precluding multiple prosecutions of a defendant for crimes involving identical elements. *Nutt, supra*, 469 Mich at 575.

In *Nutt*, the defendant pleaded guilty in a Lapeer County Court of one count of second-degree home invasion. *Nutt, supra*, 469 Mich at 569. Later, the defendant was bound over for trial in Oakland County on the charge of receiving and concealing a stolen firearm—the firearm was obtained in the defendant’s admitted participation in the Lapeer County theft. *Nutt, supra*, 469 Mich at 570. The defendant moved to dismiss the receiving and concealing charge because *White* required the state “to join at one trial all charges arising from a continuous time sequence that demonstrated a single intent and goal.” *Nutt, supra*, 469 Mich at 570.

The Michigan Supreme Court concluded that it had incorrectly construed the meaning of the constitutional phrase “same offense” in its *White* decision because the ratifiers of the 1963 Constitution intended that “same offense” be accorded the meaning given its federal counterpart and that it be interpreted consistently with “state and federal double jeopardy jurisprudence as it then existed.” *Nutt, supra*, 469 Mich at 575. The Court stated that the *White* Court “strayed from [the ratifiers’] intent when it adopted the same transaction test” and explained that the remedy for that error required a “return to the same-elements test, which had been consistently applied in this state until its abrogation . . . in 1973 [footnote omitted].” *Nutt, supra*, 469 Mich at 575.

Michigan's return to the same-elements test signifies a return to "the well-established method of defining the Fifth Amendment term 'same offence'" known as the *Blockburger* test. *Nutt, supra*, 469 Mich at 576; *Blockburger v United States*, 284 US 299, 304 (1932). The *Blockburger* test "focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Nutt, supra*, 469 Mich at 576, quoting *Iannelli v United States*, 420 US 770, 785 n 17 (1975).

The same-elements test, as dictated directly by the *Blockburger* Court, provides:

"The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger, supra*, 284 US at 304; *Nutt, supra*, 469 Mich at 577-578.

As applied to the *Nutt* case, the Court determined that the defendant could properly be tried for the receiving and concealing charge even though she pleaded guilty to the offense from which the stolen property was obtained. *Nutt, supra*, 469 Mich at 593. Because the elements required to convict her for each offense were not identical, the defendant's protection from double jeopardy was not violated. *Nutt, supra*, 469 Mich at 593. Specifically, the defendant's conviction for second-degree home invasion required proof that (1) the defendant entered a dwelling by breaking or entered without permission, and (2) the defendant entered with the intent to commit a felony or larceny in the dwelling. *Nutt, supra*, 469 Mich at 593. The defendant's conviction for receiving and concealing a stolen firearm required proof that (1) the defendant received, concealed, stored, bartered, sold, disposed of, pledged, or accepted as security for a loan, (2) a stolen firearm or stolen ammunition, and (3) the defendant knew that the firearm or ammunition was stolen. *Nutt, supra*, 469 Mich at 593. The Court explained:

"Clearly, there is no identity of elements between these two offenses. Each offense requires proof of elements that the other does not. Because the two offenses are nowise the same offense under either the Fifth Amendment or art 1, § 15, we affirm the result reached by the Court of Appeals majority and hold that defendant is not entitled to the dismissal of the Oakland County charge." *Nutt, supra*, 469 Mich at 593.

8.12 Double Jeopardy and Contempt Proceedings

C. The “Same Offense” — Michigan and Federal Principles

3. *United States v Dixon* — the “Same Offense” in Federal Courts

On page 380, delete the contents of the “**Note**” in the middle of the page and insert the following text:

Note: In *People v Nutt*, 469 Mich 565, 568 (2004), the Michigan Supreme Court readopted the *Blockburger* test, also known as the “same-elements” test, to determine whether the prohibition against double jeopardy is violated when multiple charges are brought against a defendant for conduct related to a single criminal transaction.

CHAPTER 12

Domestic Violence and Access to Children

12.2 Determining a Child's Best Interests in Custody Cases Involving Allegations of Domestic Violence

B. Principles for Weighing the Best Interest Factors

On the bottom of page 491, insert the following text:

When weighing the best interest factors, the court may also interview the child to determine if the child has a preference regarding custody. MCR 3.210(C)(5)* states:

“(5) The court may interview the child privately to determine if the child is of sufficient age to express a preference regarding custody, and, if so, the reasonable preference of the child. The court shall focus the interview on these determinations, and the information received shall be applied only to the reasonable preference factor.”

*Effective May 1, 2004.
Administrative
Order 2002-13.